IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35245

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 614**
	)	
Plaintiff-Respondent,	)	**Filed: September 18, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
LYNN EDWARD MECHAM,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. John K. Butler, District Judge.

Judgment of conviction for lewd conduct with a child under the age of sixteen, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Lynn Edward Mecham appeals from his judgment of conviction for two counts of lewd conduct with a child under the age of sixteen, Idaho Code § 18-1508. Specifically, he appeals from the denial of his motion to suppress evidence. We affirm.

I.
BACKGROUND

The record indicates that Mecham was booked into the Gooding County jail on a probation violation and released. Later, Mecham was brought in for questioning. Police Chief Jeff Perry began by asking Mecham if he understood what *Miranda*[1] rights were. After Mecham nodded that he understood, Chief Perry quickly read him his *Miranda* rights from a prepared waiver form. When Chief Perry finished reading from the form, he asked Mecham to select "I

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

do" or "I do not" wish to speak with law enforcement, and initial and sign the form. As he passed the form to Mecham, Chief Perry asked how he was being treated at the jail. Mecham signed and initialed the form, but did not indicate whether he wished to speak with the officers. He informed Chief Perry that he wanted to know why he was there before he decided whether to speak with him. Chief Perry explained to Mecham that there were some criminal accusations against him, and that he (Chief Perry) had a lot of work and was simply trying to get some things out of the way that day. Mecham told Chief Perry that "David said keep my mouth shut," and explained that David was his lawyer, and he had seen him in booking. When Chief Perry asked Mecham why he was supposed to keep his mouth shut, Mecham said he just was not supposed to talk to anybody. After Mecham again emphasized that he did not know why he was there, Chief Perry informed him that he was there because he was being accused of rape and he wanted to know Mecham's side of the story. After a brief moment Mecham said, "Yeah, you can ask me some questions." Mecham then circled "I do" on the *Miranda* waiver form indicating that he was willing to talk to officers while simultaneously stating, "I do."

As a result of the interrogation, Mecham made several incriminating statements. The record indicates that Mecham was clear, coherent, responsive, made eye contact when answering questions, and asked for clarification when he did not understand a question. He admitted he was wrong for doing what he did and stated that he should not have done it. After Mecham was asked to write down his statement, he asked if it would be used against him in court. When Mecham learned that it could, he made the decision to write it anyway.

Mecham moved to suppress his statements claiming he had invoked his right to counsel, and the waiver of his *Miranda* rights was involuntary. A psychologist testified that Mecham has a borderline intelligence level of 71. Mecham also had previously been diagnosed with bipolar disorder, and the psychologist determined that he may have attention deficit hyperactivity disorder (ADHD) as well. The district court denied the motion to suppress. Mecham appeals the denial of his motion to suppress evidence.

II.

STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the

facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

III.
DISCUSSION

A. Mecham Did Not Unequivocally Invoke His Right to Counsel

Mecham asserts that the statements he made to Chief Perry and his probation officer should be suppressed because the questioning did not stop after he invoked his right to counsel. In order to combat the pressures of a custodial interrogation, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The right to the assistance of counsel is "indispensible to the fair administration of our adversarial system of criminal justice," *Maine v. Moulton*, 474 U.S. 159, 168-69 (1985), and is one of the rights explained during standard *Miranda* warnings. The right to have counsel present, as with the right to remain silent, may be invoked at any time. *Miranda*, 384 U.S. at 470. An accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *see also State v. Cheatham*, 134 Idaho 565, 574, 6 P.3d 815, 824 (2000); *State v. Rhoades*, 121 Idaho 63, 74, 822 P.2d 960, 971 (1991); *State v. Kysar*, 116 Idaho 992, 996, 783 P.2d 859, 863 (1989); *State v. Salato*, 137 Idaho 260, 267, 47 P.3d 763, 770 (Ct. App. 2001).

In *Davis v. United States*, 512 U.S. 452, 458 (1994), the United States Supreme Court explained:

> Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.

> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

(Citations omitted). While it may be a good practice for police officers to cease questioning and seek clarification when an individual makes an equivocal or ambiguous statement about wanting an attorney, it is not required. *Davis*, 512 U.S. at 460; *State v. Eby*, 136 Idaho 534, 537, 37 P.3d 625, 628 (Ct. App. 2001). "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Davis*, 512 U.S. at 459; *Eby*, 136 Idaho at 537, 37 P.3d at 628.

Mecham asserts that his statement, "David said keep my mouth shut," was an unequivocal and unambiguous request for counsel. However, the case law does not support this argument. In *Eby*, 136 Idaho at 537, 37 P.3d at 628, after Eby was read his *Miranda* rights and had waived them, this Court held that the statement, "I've got an attorney," was not an unambiguous invocation of the right to counsel, and officers were not obligated to terminate the interrogation or seek clarification. Similarly, in *State v. Varie*, 135 Idaho 848, 853, 26 P.3d 31, 36 (2001), after being read her *Miranda* rights and told she was not under arrest, Varie told investigating officers that she did not have a lawyer but could call someone and asked the officers if she was supposed to have a lawyer. The lead officer told her it probably would not make a difference, and emphasized that he was simply trying to confirm information for his report. A second officer then confirmed that Varie wanted to talk with the officers without an attorney present. Although Varie inquired about an attorney, such an inquiry was not a clear and unequivocal request for counsel. *Id.* In a case very much like this one, the Ninth Circuit Court of Appeals held that a suspect's statement that he was told by his attorney to keep his mouth shut was not a clear invocation of his rights. *Sechrest v. Ignacio*, 549 F.3d 789, 806 (9th Cir. 2008). In *Sechrest*, the interviewing officer asked if Sechrest wanted to speak with him, and Sechrest agreed to let him ask questions, stating that he would only answer the questions he wanted to answer. Although Sechrest told the officers what his attorney's advice was, he did not make it clear that he intended to follow that advice. The Court held that the mere mention of an attorney or advice from an attorney "is not an unambiguous request for counsel." *Id.* at 807.

We conclude that Mecham's statement, "David said keep my mouth shut," does not constitute a clear and unequivocal invocation of his right to have counsel present during the interrogation or to terminate the questions. Although Mecham told Chief Perry the advice his lawyer gave him, he never made it clear he intended to follow that advice. The district court did not err when it determined that Mecham did not unequivocally invoke his right to counsel and denied his motion to suppress.

B. Mecham Voluntarily Waived His *Miranda* Rights

Mecham also asserts that his statements should be suppressed because he did not voluntarily waive his *Miranda* rights. Any waiver of *Miranda* rights or the underlying constitutional privilege against self-incrimination must be made knowingly, voluntarily and intelligently. *State v. Dunn*, 134 Idaho 165, 169, 997 P.2d 626, 630 (Ct. App. 2000). The state bears the burden of demonstrating that an individual has knowingly, voluntarily and intelligently waived his or her rights by a preponderance of the evidence. *Dunn*, 134 Idaho at 169, 997 P.2d at 630; *State v. Doe*, 131 Idaho 709, 712, 963 P.2d 392, 395 (Ct. App. 1998). A trial court's determination that a defendant made a knowing, voluntary and intelligent waiver of his or her *Miranda* rights will not be disturbed on appeal unless it can be shown that such a conclusion is not supported by substantial and competent evidence. *Varie*, 135 Idaho at 851-52, 26 P.3d at 34-35; *State v. Person*, 140 Idaho 934, 937, 104 P.3d 976, 979 (Ct. App. 2004); *Salato*, 137 Idaho at 267, 47 P.3d at 770. On appeal, this standard is measured by reviewing the totality of the circumstances surrounding the waiver. *Person*, 140 Idaho at 937, 104 P.3d at 979; *Dunn*, 134 Idaho at 169, 997 P.2d at 630. The underlying purpose of this standard is to determine if the defendant's will was overborne. *Person*, 140 Idaho at 937, 104 P.3d at 979.

> The following factors must be considered in determining whether a confession was voluntary:
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> (1) Whether *Miranda* warnings were given;
> (2) The youth of the accused;
> (3) The accused's level of education or low intelligence;
> (4) The length of the detention;
> (5) The repeated and prolonged nature of the questioning; and
> (6) Deprivation of food or sleep.

State v. Doe, 137 Idaho 519, 523, 50 P.3d 1014, 1018 (2002); *Person*, 140 Idaho at 937, 104 P.3d at 979.

Low intelligence does not necessarily mean an individual does not have the capacity to voluntarily waive his or her *Miranda* rights. *See Dunn*, 134 Idaho at 169, 997 P.2d at 630. In that case, the defendant argued that he did not knowingly, voluntarily and intelligently waive his *Miranda* rights due in part to his low intelligence. The defendant had been diagnosed with bipolar disorder and attention deficit disorder, and at one point had a "mentally deficient" IQ score of 64. However, during questioning the defendant was lucid, coherent and responded to questions when he wanted to respond. In addition, he had previously been exposed to the criminal justice system on numerous occasions where he was informed of his *Miranda* rights and waived them in writing. Therefore, this Court concluded that the defendant's low intelligence did not make the waiver involuntary, and the totality of the circumstances indicated that his waiver was knowing, voluntary and intelligent. *Id.*

While Mecham has a borderline intelligence level of 71, the totality of the circumstances supports the district court's ruling that Mecham understood the nature of his rights and waived them voluntarily. Mecham's low intelligence, bipolar disorder and ADHD are factors to be considered in determining whether his waiver was voluntary, but alone these are not an indication that he did not understand his rights and did not have the capacity to voluntarily waive them. The record reflects that when Mecham was read his *Miranda* rights and asked if he understood them, he nodded affirmatively to indicate that he did. Moreover, Mecham showed a willingness to answer questions only after he was informed of the reason behind the questioning. During questioning, Mecham was clear, coherent, responsive, made eye contact and when answering questions, did not hesitate in asking for clarification when he did not understand a question. Furthermore, Mecham demonstrated that he understood the possible consequences of making a written statement when he asked Chief Perry if it could be used against him in court, and deciding to write it anyway when he found out that it could.

Chief Perry may have attempted to distract Mecham or downplay the importance of his *Miranda* rights and waiver by asking him how they were treating him at the jail and telling him this is something he just wanted to get out of the way that day. However, there is no evidence that Mecham's will was overborne by use of any coercive tactics on the part of law enforcement. Also, Chief Perry's comments indicating that he did not believe Mecham forcibly raped the victim may have been deceptive, but as the district court points out, deception can be a valid

interrogation technique, and does not render Mecham's waiver involuntary. The totality of the circumstances demonstrates that Mecham voluntarily waived his *Miranda* rights.

IV.

CONCLUSION

The district court did not err when it denied Mecham's motion to suppress incriminating statements made to law enforcement. Mecham did not unequivocally invoke his right to counsel, and the totality of the circumstances indicates that he voluntarily waived his *Miranda* rights. Accordingly, we affirm Mecham's judgment of conviction.

Chief Judge LANSING and Judge PERRY **CONCUR**.